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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1012

FRED WASHINGTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fred Washington, petitioner, prays that a writ of certiorari be issued to review the decree of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 17th, 1958, affirming the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

The trial court filed no opinion, The opinion of the Court of Appeals has not yet been published It appears in the appendix of this petition. (p. 1a.)

JURISDICTION.

The judgment of the Court of Appeals was entered on April 17th, 1958. The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, and Rule 19.

QUESTIONS PRESENTED.

Whether an arrest made only for an ulterior purpose and without probable cause was not an unwarranted and illegal invasion of the rights of the defendant as guaranteed by the Fourth and Fifth Amendments to the Constitution.

Whether the failure of the Government to sustain its burden of proving the defendant guilty beyond a reasonable doubt did not make his acquittal mandatory.

STATUTES INVOLVED.

United States Code, Title 26, Sec. 4704 (a)
United States Code, Title 21, Sec. 174

STATEMENT OF THE CASE.

On June 17th, 1956 at about 5:15 P.M. agents of the Federal Narcotics Bureau, without a search warrant (app. 86) knocked "pretty hard" on the door of the apartment occupied by Mrs. Ardie Kernick and her husband.

Mrs. Kernick opened the door as far as the burglar chain would permit, looked through the "crack" and was told by one of the agents, "Open the door or I'll kick it in". (App. 86)

Thereupon Mrs. Kernick opened the door and permitted the agents to come in. They were "rough" and they told her that they had arrested her husband in Kansas City, and they also said that they would go easy with her and

her husband if she would call Fred Washington. They said, (App. 88)

> "If you don't help your husband, he is liable to rot in jail".

Mrs. Kernick was apprehensive because her husband is elderly. The agents also promised to see that her bond, on arrest, would be lowered.

The agents then started a systematic search of the entire Kernick apartment. They took her things out of the drawers and looked through the furniture, but did not put the things back. (App. 86)

About two or three hours after the agents entered the apartment, Mrs. Kernick made the call as requested. (App. 86)

Agent Heisig testified that the call was made at his "suggestion". (App. 24)

The phone number which was dialed by Mrs. Kernick was listed in the name of Mrs. Washington, the defendant's wife. (App. 48)

Agent Heisig testified that he put his head "right against hers" and listened to the conversation. (App. 24) Agent Mattera later testified that he too listened to the same conversation at the same receiver at the same time. (App. 77) Heisig did not testify that Mattera listened to the conversation.

Prior to the call neither Agent Heisig nor Agent Mattera had ever heard the voice of Fred Washington. (App. 14 76-78)

Since this telephone conversation is the only evidence and is the entire case of the Government insofar as peti-

tioner Fred Washington is concerned, we are printing it here as testified to by Agent Heisig: (App. 17)

> Ardie Kernick said, "Hello, is this Fred?"
> Fred Washington said, "Yes. This is Fred. Who is this?"
> Ardie Kernick said, "This is dee, baby" and he said "Yes."
> Ardie Kernick said, "I would like a couple".
> And he said, "I can get you a couple."
> And then she said, "How long will it take?"
> Then he said, "About an hour or so."
> She said, "Okay".
> And he said, "Okay".

Mrs. Kernick's testimony as to the content of the above conversation, slightly different from the above appears on page 81 of the Appendix.

About an hour after the call, Leon Washington, the brother of petitioner, Fred Washington, arrived at the home of Ardie Kernick, and had in his possession one-sixth on an ounce of heroin. (App. 12)

Leon Washington testified that it was he that Mrs. Kernick spoke to on the phone. (App. 94-96)

Mrs. Kernick testified that it was not Fred Washington to whom she spoke on the phone. (App. 89)

Petitioner Fred Washington, who has no previous narcotic record, denied that he received a call from Mrs. Kernick on the day in question. (App. 91)

Although when the call was made, Agent Heisig did not know the voice of the person to whom Mrs. Kernick was speaking, (App. 14-16), nevertheless and without further identification he ordered the arrest of Fred Washington. Heisig testified: (App. 25)

"I ordered the arrest, but I was not certain that the defendant was the same person as the person to whom the phone call was directed."

During part of the telephone conversation, Agent Heisig and Agent Mattera were carrying on a conversation for the benefit of other agents present, but not listening to the conversation. (App. 71)

Leon Washington testified that he was an addict and that when he got the call from Mrs. Kernick he thought that by delivering the narcotics, he could get a "fix" for himself. Leon Washington has been convicted and is serving his sentence in connection with the delivery of the narcotics above described.

About two hours after the call above referred to, was made by Mrs. Kernick, Agents Emerick and Love, without a warrant, arrested Fred Washington. (App. 56)

When Fred Washington was arrested he was not violating any law. (App. 56)

The next morning Agent Heisig and Agent Mattera spoke to Fred Washington in the office of the Narcotics Bureau. This was the first time that either of them had ever spoken to Fred Washington or heard his voice, except for the fact that they identified it as the voice which they had heard speaking to Mrs. Kernick the night before. (App. 24)

The Court found the defendant guilty and sentenced him to a term of 2 years and fined him $1.00.

REASONS FOR GRANTING THE WRIT.

The evidence of the Government is weak, contradictory and incredible, therefore the conviction should be reversed.

The dissenting opinion of Chief Judge Duffy (See Appendix of this brief) states succinctly and cogently many reasons why the validation of the judgment of the Court below, would be a gross misapplication of the basic protections guaranteed our people by the Constitution.

Preliminarily we would like to assure the Court that we understand fully the reluctance with which this Court will review a case on the evidence alone. Yet we are compelled to the conclusion that this is a case which cries out for a decision, spelling out boundaries beyond which the Federal Agent may not trespass in his zealous endeavor to uncover violations of law.

Judge Duffy says in his dissent, (opinion p. 5)

> "I respectfully dissent. I am inclined to believe that the natural abhorrence that all good citizens must feel toward those engaged in the illicit narcotic business, has caused the majority of this panel to reach an erroneous conclusion."

The words of Judge Duffy are a warning signal which we cannot afford to ignore.

The present intensive drive to eliminate the narcotic traffic must not be used as a cloak for depriving our citizens of their basic rights. Should this invasion be permitted, why not others?

The question which we raise here is that there is no legal evidence to connect this petitioner with the offense charged.

In *Abrams* v. *United States*, 250 U.S. 616, 619 this Court said:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."

We have seen in the Statement of Facts herein how Agents for the Narcotic Bureau wholly disregarding the rights of the people, without a search warrant, gained access to the apartment of Mrs. Kernick by intimidation and threat. (App. 86)

After ransacking the apartment for about two hours and making promises and threats of one kind and another, the agents had Mrs. Kernick dial the phone of Mrs. Washington, the wife of Petitioner. (App. 36)

The conviction of the defendant in this case rests on the above alleged telephone conversation between one of the witnesses in the case and the defendant. Parenthetically we might call the Court's attention to the fact that the person making the call denied on the stand that she spoke to the defendant. (App. 89) The defendant testified that he did not get the call. (App. 91) The defendant's brother, and the one arrested in possession of the contraband, testified that it was he who received the call and spoke to Mrs. Kernick in the phone conversation here in question. (App. 95)

The defendant's voice was — at the time of the call — unknown to the agent who allegedly listened to the conversation. As related by the agent, there were exactly 20 words used by the defendant. We have tested with a stop

watch the amount of time, speaking slowly, that it would take to repeat those 20 words. That time is 10 seconds.

So, in 10 seconds — with the added handicap of two or three persons listening through the same receiver, at the same time, (App. 24, 77) and carrying on another conversation (App. 71) — the agent testified that a voice then unknown became so familiar to him that he was able to identify it as the voice of the defendant, Fred Washington, to whom he spoke for the first time the morning after the defendant was arrested.

Let us try to analyze this incredible testimony. A telephone receiver is about two inches in diameter. The voice is projected from an aperture of about one-half an inch. If we believe the implication of the testimony of agent Heisig, then he alone with his head up against the head of Mrs. Kernick listened to the less than one-quarter of a minute of telephone talk. If on the other hand we believe the testimony of agent Mattera, then all three had their ears to this small receiver. If either version is correct we contend that it was impossible, incredible and wholly inconsistent with experience in the ordinary affairs of life to believe that two or three persons endeavoring to hear a conversation from an instrument as small as a telephone receiver, could possibly, after hearing the few words uttered, in the short space of ten seconds, become so familiar with that voice, that in a conversation with a man the next day a witness could in all fairness and honesty say, "that is the voice I heard on the telephone". We are sure the Court will recognize the fact that, because of the difficulty of fitting all the heads at the telephone receiver, at the same time, certain of the 20 words spoken, must of necessity have been unintelligible to some of the listeners.

Since we have only the evidence of agent Heisig to the effect that it was the defendant Fred Washington on the other end of the antiphonal conversation, we must agree that at best there must be many areas of conjecture and speculation on the part of Heisig.

The direct evidence by the witnesses best informed on the subject matter here in dispute indicates that the *defendant was not the person* to whom Mrs. Kernick spoke on the evening in question.

Mrs. Kernick, (subpoenaed by the government, but, testifying as a court's witness) the woman who having been treated to a display of police brutality lasting more than two hours, at the "suggestion" of agent Heisig made the call and testified that it was *not the defendant* to whom she spoke. (App. 89)

Most important of all is the testimony of Leon Washington, the brother of the defendant. This brother is an addict and had a previous record (App. 94) and was fully cognizant of the fact that telling the truth about this conversation might mean additional time in the penitentiary for him, nevertheless he took the stand freely and admitted that it was he who had the telephone conversation with Mrs. Kernick. (App. 96)

Petitioner Fred Washington, who has no previous narcotic record (App. 91) testified that he did not answer the phone nor speak to Mrs. Kernick in the conversation. (App. 91)

While it is impossible in the dead record of a trial to bring before this Court the live voices of the two brothers, the Court may very well take into consideration the fact that there may have been many similarities in their voices

which could very well have influenced the thinking of agent Heisig. Although we feel that our argument under this point needs no precedent in the law to fortify us nevertheless we do think that some of the language used in the cases may be helpful.

In *Towbin* v. *United States*, 93 F. 2 861, 866 the Court stated:

> "Some evidence has been presented but it is not substantial. The law requires more than merely, 'some evidence'. It demands that the verdict be based on substantial evidence or a conviction will not be permitted to stand."

See also cases cited in the *Towbin* case.

Also appropriate is the quote from Wigmore on Evidence, Vol. 3, Sec. 2155:

> "But, if there is no recognition of voice, what can supply sufficient evidence to authenticate the speaker? In a given case, no doubt, sundry circumstances (including other admissions and the like) may suffice. But, apart from special circumstances, can any rule be laid down? No one has ever contended that, if the person first calling up is the very one to be identified, his merely purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient."

This case has many aspects which remind one of the case of *United States* v. *Kaplan* reported in 101 F. Supp. 7 and affirmed in 102 F. 2 1019. In that case two brothers named Max and Nathan Kaplan were mistaken for each other by the Government agent and as a result the brother Max spent six years in the penitentiary by mistake. In the trial of Nathan Kaplan—just as here—the Court said at page 10:

> "Thus, mistaken identity was the central issue."

The Court in speaking of the mistake of the Agent said, pages 10-11:

> "No question is raised as to the honesty of the Government Agent, but there is a serious question as to his opportunity for precise observation."

The tragedy of the *Kaplan* case was that even after everyone admitted the mistake it was too late for him to have a Court set aside the conviction and we understand that to this day his record remains. In the recent book by the late Judge Frank and his daughter, "Not Guilty" mention is made of the *Kaplan* case.

II.

The erroneous introduction of the telephone call coupled with the arrest without probable cause deprived defendant-petitioner of his rights as guaranteed to him by the Constitution of the United States.

It is not unreasonable to conclude from this record that agent Heisig had, before he went to the apartment of Mrs. Kernick, decided that he was going to arrest the defendant Fred Washington. His admitted "suggestion" (App. 24) to Mrs. Kernick that she call Fred Washington tells us that he was out that night to arrest Fred Washington. His zeal is best demonstrated by the following testimony which he gave (App. 25):

> "I ordered the arrest (of defendant Fred Washington), but I was not certain that the defendant was the same person as the person to whom the phone call was directed."

The above shows a callous disregard of the rights of a citizen to be protected in his person from arrest except under legal circumstances. This callousness has been condemned consistently by the courts of our land.

Mr. Justice Day in *Weeks* v. *United States*, 232 U.S. 383, stated:

> "While the efforts of courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution."

In *People* v. *Castree*, 311 Ill. 392, 406, the Court said:

> "A consideration of the origin, history and use of writs of assistance in England and their use in this country and the evolution of the Fourth Amendment to the Federal Constitution, manifests the importance of this safeguard of the citizen against unreasonable searches and *seizures of his person* or property, and the necessity that it shall not be frittered away by the courts by a narrow and illiberal construction, and a willing blindness to its violation." (emphasis ours)

In *People* v. *Marxhausen*, 204 Mich. 559, 171 N.W. 557, the Supreme Court of Michigan held:

> "• • • that the 'end justifies the means' • • • is a doctrine which has not found lodgment in the archives of this court."

The right of the individual to be protected against arbitrary and unreasonable acts of government officials had its beginnings in England at the time of Magna Charta in the early thirteenth century. When these rights were invaded courts were always ready to give the offended individual substantial relief.

In *Huckle* v. *Money*, 2 Wilson 205 (1763), an action for false arrest and imprisonment based upon an illegal general search warrant, the Judge awarded the plaintiff 300 pounds, as damages for the false arrest, even though the

evidence showed that the plaintiff was a journeyman printer earning only a guinea per week in wages, and was in custody but a few hours and treated civilly with beef steak and beer.

Lord Chief Justice Pratt said:

> "* * * the small injury done to the plaintiff or the inconsiderableness of his station and respect in life did not appear to the jury in that striking light in which the greater point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Charta and attempting to destroy the liberty of the Kingdom, by insisting upon the legality of this general warrant before them; * * * to enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish inquisition, a law under which no Englishman wish to live an hour; it was a most daring attack made upon the liberty of the subject; I thought ...at the 29th Chapter of Magna Charta, * * * which is pointed against arbitrary power, was violated."

The intense feeling in the England of the 18th Century against such arbitrary abuse of power has been carried over in the United States. It was because of this intense feeling that the guarantees were incorporated in our Constitution.

It is obvious that the over-zealous official was the evil sought to be remedied by the constitutional provisions.

Cooley in his *Constitutional Limitations*, 8th Edition, page 615, states that the history of the United States immediately previous to the American Revolution in regard to writs of assistance which empowered officers in their discretion to search suspected places, were pronounced "the worst instrument of arbitrary power, the most de-

structive of English liberty and the fundamental principle of law, that ever was found in any English law book"; since they placed "*the liberty of every man in the hands of every petty officer*". Quoting from the works of John Adams, Vol. II, pages 523, 524. (Emphasis added.)

In the case of *Gouled* v. *United States*, 255 U. S. 298, 304, the court in deciding a question of unreasonable search took occasion to say:

> "Such rights (protection against unreasonable searches and seizures) are declared to be indispensable to the full enjoyment of *personal security, personal liberty* and private property, they are to be regarded as the *very essence of constitutional liberty;* and that the guarantee of them is as important and as imperative as are the guarantees of the other fundamentals of the individual citizen; that is, the right of trial by jury, to the writ of Habeas Corpus, and to due process of law" (emphasis added).

It is our position that the over-zealous agent in this case used such methods in endeavoring to detect and punish violators of the law that his acts were as reprehensible as the offenses he was seeking to punish. The United States Supreme Court has handed down many decisions touching on the illegal activities of over-zealous officers.

In *Matter of Jackson*, 96 U.S. 727, the Court used the following language:

> "Instances sometimes occur in which ministerial officers take such liberties in endeavoring to detect and punish offenders as are even more criminal than the offenses which they seek to punish."

Assuming *arguendo* that agent Heisig did hear a voice on the telephone, it is clear, since the voice was unknown to him that he was forced to order the illegal arrest s

that he might also have an opportunity of hearing the defendant's voice so as to justify his testimony. He may have felt that if after the arrest he changed his mind and could not identify the voice on the phone he would simply say, "sorry" and go on to something else. Such a procedure should not be validated by a conviction in this case.

Recently in *Rea* v. *United States,* 350 U.S. 214, 217 (1956), the Court stating the position sought to be sustained under this point held:

> "The obligation of the Federal Agent is to obey the rules. They are drawn for innocent and guilty alike. They prescribe standards of law enforcement. They are designed to protect the privacy of the citizen, * * *. That policy is defeated if the Federal Agent can flout them and use the fruits of his unlawful act either in Federal or State proceedings."

This court, we are sure, will take judicial notice of the fact that the foundation of our government rests upon our democratic institutions, born in England in the 13th century with the Magna Charta, painstakingly developed there over the centuries, and then transported to the shores of America, where the Fathers of the American Constitution in their far-reaching wisdom drafted a Constitution that has extolled and protected the rights of freedom and liberty in the individual citizen above all else. These cherished democratic institutions are now being attacked and threatened by the rising power of the police state in other parts of the world where the government official is the repository of power and the private individual lives in complete subjection without rights of liberty, privacy or property. It is in times such as these that the Courts must be particularly vigilant and stand as the bulwark to stem this monstrous power from engulfing our way of life.

We feel that the case at bar must be interpreted and adjudicated in the light of the background and development of our democratic institutions, and the threat to these institutions. In other words, our way of life *vis-a-viv* the way of life of the countries which have forsaken the dignity of the individual.

CONCLUSION.

It is submitted that the protection of the citizen from persecution by police officials has been the sacred obligation of all, but particularly has it been guarded by the Courts for without their vigilance, Magna Charta, Our Constitution and the Bill of Rights would now be only historic reminders of a dead ideal.

The public interest is, therefore, highly involved in this case—that, in a democracy, justice shall be fair, regular, and in accord with the law of the land.

Wherefore, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Respectfully Submitted,

DANIEL D. GLASSER,
Counsel for Petitioner

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12185 SEPTEMBER TERM 1957—APRIL SESSION 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRED WASHINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 17, 1958

Before DUFFY, *Chief Judge*, HASTINGS and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* This appeal is from a conviction on a two count indictment charging narcotic law violations of Title 26 U.S.C.A. §4704(a) and Title 21 U.S.C.A. §174, respectively. Trial was to the court.

The District Court found both defendants, Leon and Fred Washington, guilty as charged. Leon Washington is now serving his sentence. Fred Washington has appealed.

The uncontroverted facts are that in the early evening of June 17, 1956 Theodore Heisig, George Mattera, George Emerick and Jack E. Love, Federal Narcotics Agents, were in the apartment of a Mrs. Kernick at 4615½ South Drexel

Boulevard in Chicago; that at the suggestion of Agent Heisig she called the apartment of Fred Washington at 4627 South Drexel Boulevard in Chicago by dialing KE 6-6460, the unlisted telephone of Della Washington, the wife of Fred Washington; that she told the agents that the person who answered was Fred Washington; that she asked him if he could send her "a couple" (meaning heroin) and he said he could and it would take about an hour.

After Mrs. Kernick had told the agents she was talking with Fred Washington and while the telephone conversation was still in progress Agents Love and Emerick left the Kernick apartment. They went to their automobile, which was parked on South Drexel Boulevard headed south behind Fred Washington's automobile, and placed the apartment of Fred Washington under surveillance. Approximately 5 to 15 minutes later they saw Fred Washington, whom they had known for several years, and another man, whom they testified was Fred's brother Leon, leave the Washington apartment and get into Fred Washington's automobile and drive away. Love and Emerick followed them. About an hour after the telephone conversation, Leon Washington came to the Kernick apartment with 483.5 grains of heroin. He was then and there arrested. Agent Heisig reported this to Love and Emerick, who then located and arrested Fred Washington.

The errors relied upon for reversal by the defendant-appellant Fred Washington arise out of the refusal of the District Court to exclude the evidence of the telephone conversation, insufficiency of the evidence, and alleged deprivation of defendant's constitutional rights in arresting him without probable cause and the introduction in evidence of the telephone conversation.

Mrs. Kernick called Fred Washington by telephone at Heisig's suggestion. She dialed KE 6-6460, which was the unlisted telephone number of the apartment where Fred Washington lived. When the telephone was answered Kernick told the agents she was then talking with Fred Wash-

ington. Heisig and Mattera listened to the entire conversation and testified that the voice of the person with whom Kernick talked was that of Fred Washington. This foundation having been laid, the telephone conversation was clearly competent. *U.S.* v. *White*, 7 Cir., 1956, 228 F. 2d 832, 835; *U.S.* v. *Carr*, 7 Cir., 1955, 219 F. 2d 876, 878-879; *U.S.* v. *Bocur*, 7 Cir., 1952, 194 F. 2d 297, 303-304; *Fabacher* v. *U.S.*, 5 Cir., 1936, 84 F. 2d 602, 604; *Morton* v. *U.S.*, 7 Cir., 1932, 60 F. 2d 696, 698.

The defendant-appellant predicates his claim of insufficiency of the evidence on the sole premise that his conviction "rests on an alleged conversation between one of the witnesses in the case and the defendant." Defense counsel has conceded in oral argument before this court that if Fred Washington was the person with whom Mrs. Kernick talked on the telephone he is guilty.

The evidence as to whether Fred Washington was that person is in conflict. Heisig testified that he was. The parties stipulated that Mattera would testify to the same facts as Heisig. Accordingly two witnesses, Heisig and Mattera, identified the voice of the man with whom Kernick had the telephone conversation as that of Fred Washington. Fred Washington testified that it was not he. Leon Washington testified that it was he who had talked with Kernick. At the request of the government, Kernick was called as a court's witness. She testified that it was not Fred Washington with whom she talked though, at one point in her testimony, she testified that she was not positive that it was not his voice that she heard.

The defendant-appellant argues that it would have been impossible for Heisig and Mattera, in the position occupied by them, to identify the voice as that of Fred Washington in view of the short duration of the conversation and the fact that they had never heard his voice before and were able to make such identification only after they talked with him the following morning. However, the trial court heard the testimony and observed the witnesses as they testified. It believed the witnesses Heisig and Mattera as against the defendants and the witness Kernick.

In determining if there is sufficient evidence to support a conviction, it is not the role of an appellate court to weigh conflicting testimony. The weight to be given and the credibility to be attached to the testimony of the witnesses is a matter for determination by the trier of the facts. *U.S.* v. *Cook*, 7 Cir., 1950, 184 F. 2d 642, 644; *U.S.* v. *Detente*, 7 Cir., 1952, 199 F. 2d 286, 288; *U.S.* v. *White*, 7 Cir., 1956, 228 F. 2d 832, 833; *U.S.* v. *Green*, 7 Cir., 1957, 246 F. 2d 155, 158.

The undisputed evidence is that Kernick dialed the unlisted telephone in the Fred Washington apartment. When a man answered Kernick was asked by one of the agents "[i]s this Fred?". She answered "yes" and the telephone conversation continued. Just as soon as Kernick said it was Fred Washington with whom she was talking Love and Emerick left the Kernick apartment and took up surveillance of the Fred Washington apartment which was two or three doors to the south. In about 5 to 15 minutes Fred Washington came out of his apartment. With those undisputed facts in evidence before the trial court we cannot say that it erred in believing Heisig and Mattera over the defendants and Kernick.

The trial judge could well believe from the evidence that Fred Washington was the person with whom Mrs. Kernick talked and, therefore, with the concession that Fred Washington is guilty if the proof established he was that person, the evidence is sufficient to sustain the finding of the District Court that Fred Washington was guilty beyond a reasonable doubt.

The contention of the defendant-appellant, Fred Washington that he was arrested without probable cause and thereby deprived of his constitutional rights is without merit. The uncontroverted facts pertaining to the occurrences on the evening of June 17, 1956 within the knowledge of the arresting officers were sufficient in themselves to warrant a man of reasonable caution to believe that a felony had been committed by Fred Washington. They had "a reasonable ground for belief of his guilt" and had

probable cause sufficient to make the arrest. *Brinegar* v. *U.S.*, 1949, 338 U.S. 160, 175-176.

Moreover, subsequent to his arrest the Grand Jury investigated and returned the indictment in the case at bar. He was arrested on a bench warrant issued on the return of the indictment and released on bond conditioned on his appearance for trial on the offenses charged.

It is well settled law that one may be arrested "'by persons without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it could hardly be claimed, that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.'" *Ker* v. *Illinois*, 1886, 119 U.S. 436, 440.

Accordingly he can not be heard to complain as to his first arrest. However, we have held that there was probable cause for his arrest on June 17, 1956 and he was not, therefore, deprived of his constitutional rights.

The judgment is AFFIRMED.

DUFFY, *Chief Judge*, dissenting:

I respectfully dissent. I am inclined to believe that the natural abhorrence that all good citizens must feel toward those engaged in the illicit narcotic business, has caused the majority of this panel to reach an erroneous conclusion.

No matter how vile or disgusting the charged criminal offense may be, the defendant thus charged still must be convicted by evidence that is convincing beyond a reasonable doubt. The burden upon the Government is unchanged. In my judgment, in the case at bar, the Government has failed to meet the obligation which rested upon it.

No narcotics were found in the possession of defendant, Fred Washington. He had no previous record of violation

of the narcotics laws. The conviction of Fred Washington must stand or fall upon his identification by the sound of his voice. Neither agent ever had heard his voice before, yet, after his arrest on the following day, these agents claimed that the voice they then heard was the same voice they had heard the day before over the telephone.

In the opinion herein, the majority sets forth what it calls "uncontroverted facts" but Mrs. Kernick testified she did not speak to Fred Washington on the phone. Further, Leon Washington, a brother of Fred, testified that he was the one who answered the phone and, of course, it was he who delivered the narcotics. We held in *United States* v. *Bucur*, 194 F. 2d 297, 304, that the representation of one party to a telephone conversation that he conversed with another was, in itself, an insufficient proof of authentication.

I concede that ordinarily, where the evidence is conflicting, we must accept that which is most favorable to the Government, and I also recognize the rule that the trier of the facts is the sole judge of the credibility of witnesses. However, there are rare occasions when the physical facts of a situation are such as to make the oral testimony utterly unbelievable.

The agents "suggested" to Mrs. Kernick that she call a certain telephone number and ask for Fred Washington. She did call the number. Apparently she talked in the usual manner with the telephone receiver at her ear. The conversation consisted of not more than thirty-five words, which ordinarily would consume about twelve seconds of time. It is the unbelievable testimony of the agents that as Mrs. Kernick was telephoning, each agent got his head close enough to Mrs. Kernick's head so that he not only heard the voice on the other end, but heard it clearly and distinctly enough so that on the following day he was able to recognize the voice he had heard on the telephone as belonging to Fred Washington.

To me such an alleged performance was impossible. Maybe a two-faced Janus who was a contortionist, might

have manipulated one of his right ears and one of his left ears so that both of the ears were touching a telephone receiver already occupied by the ear of a third person, but I doubt it. In the case at bar, we have the picture of not one but two agents getting close enough to a telephone receiver already at the ear of Mrs. Kernick, so that they not only heard a voice they never had heard before, but were able to take note of the quality and the sound of the same, and readily identify that voice the following day.

After the telephone call, and before seeing Fred Washington, agent Heisig ordered that Fred Washington be arrested. Heisig testified "I ordered the arrest, but I was not certain that the defendant was the same person to whom the phone call was directed."

Disregarding, as we should, the identification of defendant, Fred Washington, by his voice, there is no competent or substantial evidence in this record to sustain the verdict of guilty. See *Abrams et al.* v. *United States,* 250 U.S. 616, 619.